

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RENE ANTHONY ACKER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 05-1214  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, )  
 FLORIDA REAL ESTATE COMMISSION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This matter was heard pursuant to notice on May 23, 2005,  
by Stephen F. Dean, assigned Administrative Law Judge of the  
Division of Administrative Hearings, in Orange Park, Florida.

APPEARANCES

For Petitioner: Rene Anthony Acker, pro se  
138 Via Disdelle  
Orange Park, Florida 32073

For Respondent: Barbara Rockhill Edwards, Esquire  
Department of Legal Affairs  
Administrative Law Division  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner lacks the moral character to be licensed  
as a Florida real estate salesperson.

PRELIMINARY STATEMENT

Petitioner, Rene Anthony Acker, applied for licensure as a real estate salesperson. On his license, Acker indicated that he had pled guilty to fraudulent use of a credit card. Based upon this information, Acker's application was denied. The letter of denial reflects that the basis was Acker's plea of nolo contendere to a charge of fraudulent use of a credit card contrary to Section 475.25(f), Florida Statutes. The denial advised Acker of his right to a hearing, which he requested, and the Commission forwarded the case to the Division of Administrative Hearings.

The matter was noticed for hearing on May 23, 2005, and heard as noticed. Petitioner appeared, testified in his own behalf and introduced Petitioner's Exhibit 1. He was given the opportunity to file late-filed exhibits, which he did not do. Respondent introduced under the seal of its document custodian Petitioner's application file as its Composite Exhibit 1.

Respondent filed a Proposed Recommended Order that was read and considered.

FINDINGS OF FACT

1. On May 4, 2004, Petitioner, Rene Anthony Acker, filed an application for licensure with the Florida Real Estate Commission as a real estate salesperson.

2. On that application, Acker revealed that he had pled nolo contendere and was placed on probation for twelve months on July 2, 2003, for fraudulent use of a credit card.

3. At hearing, Acker testified regarding the events that led to his arrest. In November of 2003 during the beginning of the Christmas shopping season, while he was a clerk at a Target Department Store, a person of interest to local law enforcement for credit card theft and who was under surveillance, presented merchandise to Acker for purchase with a credit card. The card was in the name of someone other than the customer. The card was accepted by Acker and the system, and the transaction completed. Subsequently, the customer returned with a high-dollar item and attempted to purchase it with the same credit card. Acker accepted the card, but the system refused to accept the card on the second occasion. Several months later, the deputy sheriff, who was working the case, came to Acker and asked him to identify the customer as part of an effort to make a case against the customer, a person with whom Acker was acquainted as the son of the owner of a restaurant where Acker had worked as a waiter. Acker told the deputy that he had no independent recollection of the transaction, and could not identify the customer from the surveillance camera pictures he was shown. The deputy indicated that if Acker did not cooperate and identify the individual, Acker would be charged with credit

card fraud. Acker stated that he could not identify the customer from the photographs as the person with whom he was acquainted. Acker was subsequently charged with credit card fraud.

4. After consulting an attorney, Acker pled nolo contendere to the charge. It was clear that this was a plea of convenience under the plea agreement that was worked out.

5. The only evidence introduced by the Commission was Acker's file that reflected that Acker revealed the plea on his application and the court records of his plea, probation, and early release from probation.

#### CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this case pursuant to Section 120.57, Florida Statutes.

7. Petitioner, as the applicant for licensure, has the burden of proving that he is qualified. See Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

8. The ground for denial is narrow: violation of Section 475.25(1)(f), Florida Statutes, which provides that the Commission may deny an applicant who has been convicted or found guilty of, or entered a please of nolo contendere to a crime in any jurisdiction which directly relates to the activities of a

licensed broker or sales associate, or involves moral turpitude, or fraudulent or dishonest dealings.

9. The only facts presented in support of denying Petitioner's application is his admission of and the record of his entry of a plea of nolo contendere. On said basis, pursuant to the statute cited above, an applicant may be denied. In explanation and mitigation, Petitioner testified at hearing. He admitted that he entered a plea of nolo contendere to fraudulent use of a credit card which under the circumstances he explained, was a plea of convenience, i.e., a plea entered by a person who perceives that it is cheaper and easier to enter the plea than go to trial. Although a plea of nolo contendere may be disqualifying, it is not deemed to be an admission of guilt for other purposes.

10. In sum, the law supports the denial of the application based upon entry of a plea of nolo contendere; however, the Commission has discretion to issue a license.

11. Petitioner testified about the circumstances surrounding his being charged with fraudulent use of a credit card. In sum, he was asked to identify a customer he had had several months previously during the beginning of the holiday shopping season. After looking at the surveillance photographs from the store's video system, Petitioner said that he could not identify the customer as a person with whom he was acquainted,

and who the police alleged had presented the stolen credit card. Even when threatened with prosecution as an accessory, Petitioner refused to identify the individual.

12. Petitioner presented as his Exhibit 1, the surveillance photos presented by the deputy sheriff to him to identify the customer. The pictures show the customer only from the rear, wearing jeans, a T-shirt, and a baseball cap. While it might be possible for someone to identify the individual from the photographs introduced, it is also not surprising that it would be impossible for a person to identify the individual from said photos. The refusal to so identify the person under penalty of being charged with an offense is certainly not probative of moral turpitude. Having reviewed the photographs, it is concluded that the refusal of Petitioner to identify the individual should be considered as a positive in terms of his morality, in the absence of any other evidence to the contrary.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

#### RECOMMENDED:

It is recommended that application of Petitioner be granted pursuant to the Commission's discretion upon consideration of the matters presented in mitigation.

DONE AND ENTERED this 12th day of August, 2005, in  
Tallahassee, Leon County, Florida.



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STEPHEN F. DEAN  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of August, 2005.

COPIES FURNISHED:

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Florida Real Estate Commission  
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.